

2001-014-187

General Services Administration
FAR Secretariat
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

**RE: FAR Case 2001-014
65 Federal Register 80255
Contractor Responsibility and Costs Incurred in Legal
and Other Proceedings.
FAR Case 1999-010 (stay)**

The Associated General Contractors of America (AGC) represents over 33,000 members involved in the construction industry in the United States. It is the largest and oldest construction contractor association in the US, and has actively represented the needs of the construction industry since 1918. AGC's regular members include approximately 7500 of the nation's leading general construction contractors, which build the majority of public, commercial and residential buildings, shopping centers, factories, industrial facilities, highways, bridges, tunnels, airports, waste treatment facilities, water conservation projects, and defense facilities in the United States.

Among AGC's goals is the promotion of better relations between public bodies and construction contractors, to maintain high professional standards in the conduct of construction work, to combat unfair practices, and to support contractors in efforts to rectify conditions of an unsatisfactory nature.

Position:

AGC strongly supports the revocation of the blacklisting regulation as outlined in FAR case 2001-014 (65 FR 80255, Contractor Responsibility and Costs Incurred in Legal and Other Proceedings). It is the position of AGC that this rule was unnecessary and ambiguous, and does not meet its intended objective. The Government has failed to articulate any rational basis for the final rule, and has placed an enormous burden on both federal contractors and the personnel who implement federal regulations for the construction agencies. The Final Rule is arbitrary, capricious, an abuse of discretion, and unlawful.

Handwritten initials and date: RUD 4/6/01

014-187

With regard to the stay, AGC requests that the stay should remain effective on the interim rule (FAR Case 1999-010) until a determination occurs on the final rule (FAR case 2001-014).

Overview:

On December 20, 2000 the FAR Council published in the Federal Register at 65 FR 80255 a final rule addressing contractor responsibility and costs incurred in legal and other proceedings.

In response to strong industry opposition, the FAR council decided to stay the final rule for 270 days, and to allow industry to comment on a reconsideration of the final rule. The FAR council stated:

"The FAR Council realizes that there was strong controversy about the merits of the two proposed rules (there were 1800 comments). The typical FAR rule generates about one percent of that amount. The two proposed rules were the most controversial ever published by the FAR Council. Adverse comments were made by individuals within the Government itself, as well as by the public.

After publication of the final rule, the FAR Council has continued to receive information that the rule is not in the best interests of industry or the Government, the way it was written. The FAR Council wants to be responsive to the needs of the contracting community, and is therefore continuing a dialog about the rule."

The Stay

AGC recommends that the stay remain effective on the interim rule (FAR Case 1999-010) until a determination occurs on the final rule (FAR case 2001-014).

Reconsideration

The FAR Council requested comments on 3 specific areas:

The FAR Council is reassessing the advantages and disadvantages of the changes made by the December 20, 2000, final rule, to determine if the benefits of the rule are outweighed by the burdens imposed by the rule. In this regard, it is not clear to the FAR Council that there is a justification:

014-187

1. for including the added categories of covered laws in the rule and its implementing certification;
2. that the rule provides contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation; or
3. that the final rule is justified from a cost benefit perspective.

It is the position of AGC that this final rule was unnecessary and ambiguous, and does not succeed in its intended objective - to provide the Government a way to assure itself that its contractors will have integrity. The current regulations already contain the requirement that contractors be responsible (FAR Part 9.104-1, (a)-(g)). Offerors must currently have a satisfactory record of integrity and business ethics (FAR Part 9.104-1(e)). Contracting officers will continue to have the authority and duty to make responsibility decisions (FAR Part 9.103(b)). Agency debarring officials already have the authority and duty to make determinations whether to suspend and debar a contractor (FAR Part 9.402(a)-(d)). As noted, there are already sufficient rules in place to handle the government's concerns.

1. There is no justification for the added categories of covered laws. By expanding the responsibility inquiry into all federal, state, and foreign laws - even when the law has nothing to do with procurement - the final rule arbitrarily eliminates any nexus between the "integrity and business ethics" criterion and the ability of a contractor to perform a particular government contract. The rule would also require contracting officers (and their support staff) to have an understanding of all laws or regulations, and the training and ability to apply highly complex laws or regulations, including those of other countries, to the facts. The requirement that the contracting officers interpret contractors' compliance with all laws, including "administrative complaints" and "private civil cases", infringes on other agencies, making this rule in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(c).

2. There is no justification that that the rule provides contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation. In fact, by mandating contracting officers to deny federal contracts for violations of the numerous laws whose

014-187

interpretation, administration, and enforcement are entrusted to other federal agencies and for which Congress has not chosen to enact such a penalty, the FAR Council is directing contracting officers to implement a rule in a manner that will be arbitrary and abusive. The agencies themselves commented against the rule on the grounds that there were insufficient clear guidelines. GSA stated: "Contracting officers will find implementation . . . difficult. In the absence of sufficient guidance on how to treat violations in the host of areas concerned, it is highly likely that disparate determinations will be made concerning the same, or similar, information leading to different treatment of the same contractor by different contracting officers. This disparate treatment will lead to additional litigation as the contractors try to understand why they are being treated differently by the government."

Nor does the final rule define which federal rules are to be evaluated when determining a contractor's compliance with "tax laws, labor and employment laws, environmental laws, antitrust laws, or consumer protection laws," which must all be certified by the contractor. Nor does the rule define the terms "satisfactory compliance", "credible information," or "significant violations," which are not defined elsewhere in the FAR, in other statutes or regulations, or in case law.

3. There is no justification that the final rule is justified from a cost benefit perspective. To comply with the final rule's certification requirements - which carry criminal penalties for improper certifications - contractors are now required to develop, acquire, install, and utilize systems to track their compliance with all state, federal, and foreign laws. In addition, the government would have to match this system to effectively monitor the process. The FAR Council's analysis failed to include any assessment of the cost to the government necessary to implement this rule.

Nor is there an effective method to use the new data. Under the Paperwork Reduction Act, an agency is prohibited from issuing a regulation that imposes an information collection unless it can certify that the rule "has been developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected. . ." 44 U.S.C. § 3506(c)(3)(H). The agencies commented that they lacked the resources and expertise to effectively use the information to be collected under the new regulations. Because of this failure, the final rule will require contractors to comply with a needless collection of

014-187

information at substantial cost. Therefore, the final rule is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

In conclusion, AGC believes that:

- The FAR Council has acted arbitrarily by failing to articulate any rational basis or need for this significant change in the FAR responsibility standards; ignoring the concerns raised by the Government's own procurement professionals that the government lacks the expertise and resources needed to implement the Rule; failing to demonstrate that any benefits of this change offset its enormous costs; and irrationally removing the requirement of a nexus between responsibility and a contractor's ability to perform a particular contract.
- By allowing individual federal agencies to deny contracts based upon violations of any law, the FAR Council has exceeded its authority to promulgate procurement regulations and has effectively amended by administrative fiat substantive federal laws that are addressed by the Final Rule—including the National Labor Relations Act (“NLRA”).
- In issuing the Final Rule, the FAR Council for the first time informed interested parties that the changes to FAR Part 9 now include evaluation of their compliance with “the law,” including all state and foreign laws, and that changes to FAR Part 52 now require contractors to certify to their compliance with state felony laws. By failing to notify contractors of these dramatic changes during the public comment period, the FAR Council has deprived interested parties of a meaningful opportunity to participate in this important aspect of the rulemaking.
- The Final Rule allows the Government to deny federal contracts without affording contractors minimal due process protections, and is so vague that it fails to provide contractors or the Government with sufficient notice of the standards to be applied and evidence to be considered in making a determination of responsibility.

014-187

- The amendment to the FAR certification provision for commercial item acquisitions is in direct violation of statutes forbidding specific certifications in the procurement of commercial items.
- The changes to Part 31 conflict with the Major Fraud Act, which dictates when legal costs are recoverable, as well as the FAR Council's own stated policy of remaining neutral in matters of labor relations.
- The FAR Council failed in its obligations, under the Paperwork Reduction Act ("PRA") and the Regulatory Flexibility Act ("RFA"), to evaluate properly the Final Rule's paperwork burden and its impact on small businesses.

AGC supports revocation of FAR Case 2001-014 (65 Federal Register 80255 Contractor Responsibility and Costs Incurred in Legal and Other Proceedings) and removal of the onerous blacklisting regulation from the FAR.